No. 14041

In the United States Court of Appeals for the Ninth Circuit

HENRY THOL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION

BRIEF FOR THE UNITED STATES

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CITATIONS

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JURISDICTION

The District Court's jurisdiction was invoked under the Tort Claims Act, 28 U. S. C. 1346 (b), by reason of a complaint filed August 2, 1951, to recover for the service-incident death of plaintiff's son, a civilian employee of the United States, on August 5, 1949 (R. 3–15).

This Court's jurisdiction is invoked under 28 U. S. C. 1291 by a notice of appeal, filed August 11, 1953 (R. 17), from an Order of the District Court, entered June 12, 1953, stating "that the defendant's motion to dismiss be, and the same hereby is, granted" (R. 16–17). The record does not contain a judgment which actually dismisses the action in accordance with the order granting the motion.

STATEMENT

According to the allegations of the complaint (R. 3–15), on August 5, 1949, plaintiff's minor son, a civilian employee of the United States Forest Service was killed in the performance of duty as a result of the negligence of his fellow employees.

On October 14, 1949, Congress amended the Federal Employees' Compensation Act so as to insert a declaration in express terms that the liability of the United States under the Compensation Act was exclusive of all other liability to any person on account of the service-incident death or injury of Government employees (Federal Employees' Compensation Act Amendments of October 14, 1949, c. 691, 63 Stat. 854, 5 U. S. C., Supp. V, 751, 757 (b). The Supreme Court has held this amendment to be merely declaratory of the preexisting law (*Johansen* v. *United States* (1952), 343 U. S. 427, rehearing denied 344 U. S. 848). Out of abundant caution, however, Congress had taken the trouble to provide expressly that the declaration of exclusiveness should apply retroactively (Section 303 (g), 5 U. S. C., Supp. V, 757 note).

On August 2, 1951, plaintiff brought the present suit against the United States under the Tort Claims Act to recover $35,000.00 damages on account of "the loss of the comfort, society, and companionship of his son, and contributions toward his support" (R. 15). By an order, entered June 12, 1953 (R. 17), the District Court granted the Government's motion to dismiss, made on the ground that "the complaint herein fails to state a claim upon which relief can

be granted" (R. 16). A notice of appeal from the order of June 12, 1953, was filed August 10, 1953 (R. 17).

The complaint contains no allegations that plaintiff is a nondependent parent and as such is not entitled to benefits under the Federal Employees' Compensation Act. Plaintiff, however, both in the District Court and in this Court, has briefed and argued his case on the ground that, since he cannot collect benefits under the Compensation Act, it should not be read as excluding all other liability of the United States to him (e. g. Br. 8). In fact, of course, it appears that if plaintiff is the personal representative of the deceased minor, he is entitled to receive payment, under the Compensation Act, of burial allowance not to exceed $400.00 (5 U. S. C., Supp. V, 561).

ARGUMENT

I

The Federal Employees' Compensation Act, like other comprehensive systems of compensation, has been authoritatively construed as fixing the total liability of the United States for service-incident death or injury

1. The present case is on all fours with *Underwood* v. *United States* (10th Cir., 1953) 207 F. 2d 862, where it was held that a nondependent widower could not recover under local law for the death of his federally employed wife, although he could collect nothing under the Federal Employees' Compensation Act. The circumstance that plaintiff here is a nondependent father instead of a widower makes no difference. In rejecting the argument that because plaintiff could

collect nothing under the Compensation Act he should be able to recover under the Tort Claims Act, the Tenth Circuit said (pp. 863, 864):

> Section 757 (b) was enacted in 1949 as an amendment to the Federal Employees Compensation Act for the avowed purpose of making it clear "that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities * * *" S. Rep. No. 836, 81st Cong. 1st Sess. p. 23. Consistently with that declared purpose, the amendment has been authoritatively construed to preclude a suit for damages under the Public Vessels Act of 1925 (43 Stat. 1112, 46 U. S. C. A. 781 et seq.) for injuries to and wrongful death of crewmen on a public vessel. *Johansen* v. *United States,* 343 U. S. 427. And see also *Sasse* v. *United States,* 201 F. 2d 871; *Lewis* v. *United States,* 190 F. 2d 22. But in all of those cases, the suit was either by an employee or a legal representative entitled to the benefits afforded by the Compensation Act.
>
> Here, the plaintiff in suit was neither an employee nor a dependent widower under Section 755 (21) (d) (A), and being without remedy under the Act, it is earnestly argued that the exclusionary provisions of Section 757 (b) were not intended to bar a separate and independent common law claim for loss of consortium recognized under applicable Colorado law. The plaintiff is fortified in this position by a recent decision of the Court of Appeals for the District of Columbia. *Hitaffer* v. *Argonne Co.,* 87 U. S. App. D. C. 57, 183 F. 2d 811, 820, 23 A. L. R. 2d 1366 * * *.

With deference to the cogent reasoning of that great court, we must agree with our trial court that the language of the Act is too clear for doubt. While there are no other federal cases directly construing the application of the Act to a remediless claimant under the Tort Claims Act, comparable provisions of state workmen compensation acts have been uniformly construed to specifically bar an independent common lawsuit for loss of consortium. *Holder* v. *Elms Hotel Co.,* 338 Mo. 857, 92 S. W. 2d 620, 104 A. L. R. 339; *Napier* v. *Martin,* Tenn. Sup., 250 S. W. 2d 35; *Bevis* v. *Armco Steel Corp.,* 156 Ohio St. 295, 102 N. E. 2d 444; *Guse* v. *A. O. Smith Corp.,* 260 Wis. 403, 51 N. W. 2d 24; *Danek* v. *Hommer,* 14 N. J. Super. 607, 82 A. 2d 659, affirmed 9 N. J. 56, 87 A. 2d 5.

Viewed in the light of the declared purposes of Section 757 (b) and in the context of antecedent judicial construction of comparable provisions of state acts, it becomes unequivocally plain, we think, that Congress intended the liability of the United States with respect to the injury or death of an employee to be exclusive and in the place of all other liability of the United States, not only to the employee, his legal representative, spouse, dependent, and next of kin, but "anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death * * * under any Federal tort liability statute." It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent

> that it saw fit to relax governmental immunity from any liability.

It is elementary in such situations that, when Congress has occupied the field by a comprehensive statute, the local state wrongful death statute will not be permitted to afford a supplemental remedy to the non-dependents whom Congress has specifically excluded. E. g. *Lindgren* v. *United States* (1930) 281 U. S. 38, 42–43. We submit, accordingly, that the court below had no choice but to grant the Government's motion to dismiss the complaint.

2. The fact that the death of plaintiff's decedent, in the present case, as in the *Underwood* case, occurred prior to the enactment of Section 757 (b) cannot affect the liability of the United States. The Supreme Court has held the provision to be merely declaratory of the preexisting exclusiveness and Congress provided Section 757 (b) should be retroactive.

Even if construed as withdrawing a preexisting right of recovery, Section 757 (b) is controlling. It is elementary that Congress may withdraw the right to sue and recover against the United States at any time. *Lynch* v. *United States* (1934) 292 U. S. 571, 581; *Maricopa County* v. *Valley National Bank* (1943) 318 U. S. 357, 362; *DeGroot* v. *United States* (1866) 5 Wall. 419, 432. But, in fact, Section 757 (b) was only declaratory of the preexisting law under which compensation excluded all other liability. In *Johansen* v. *United States* (1952) 343 U. S. 427, the Supreme Court observed:

> * * * It is quite understandable that Congress did not specifically declare that the

Compensation Act was exclusive of all other remedies. At the time of its enactment, it was the sole statutory avenue to recover from the Government for tortious injuries received in Government employment. Actually it was the only, and therefore the exclusive, remedy. See *Johnson* v. *United States,* 186 F. 2d 120, 123 [343 U. S. at p. 433]. * * *

The purpose of the 1949 amendment is simply "to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States on its instrumentalities * * *." S. Rep. No. 836, 81st Cong., 1st Sess., p. 23 [pp. 436–437].

* * * * *

The Federal Employees Compensation Act, 5 U. S. C. §§ 751 *et seq.,* was enacted to provide for injuries to Government employees in the performance of their duties. It covers all employees. Enacted in 1916, it gave the first and exclusive right to Government employees for compensation, in any form, from the United States. It was a legislative breach in the wall of sovereign immunity to damage claims and it brought to Government employees the benefits of the socially desirable rule that society should share with the injured employee the costs of accidents incurred in the course of employment. Its benefits have been expanded over the years. See 5 U. S. C. (Supp. III) §§ 751 *et seq.* Such a comprehensive plan for waiver of sovereign immunity, in the absence of specific exceptions, would naturally be regarded as exclusive. See *United States* v. *Shaw,* 309 U. S. 495. Such a position does not

> run counter to the progressive liberalization of the right to sue the United States or its agencies for wrongs. This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States,* 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." P. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive [pp. 439–440].
>
> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect [p. 441].

The decided cases have repeatedly applied this rule that a comprehensive system of compensation is exclusive unless it contains express provision for additional recoveries by suit. In the absence of a declaration that the act is an additional or alternate remedy, the statute must be read as being exclusive, mere absence of a provision such as was added by Section 757 (b), will not permit reading the statute as non-exclusive as plaintiff is insisting in the present case.

In the earlier case of *Feres* v. *United States* (1951) 340 U. S. 135, although the compensation statute made no provision for its exclusiveness, the Supreme Court said (at pp. 143, 144):

> We cannot ignore the fact that most states have abolished the common-law action for dam-

ages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability.

* * * * *

This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

So in *Lewis* v. *United States* (1951) 190 F. 2d 22, the District of Columbia Circuit had to pass on the case of a U. S. Park policeman, whose compensation statute, like the government seamen in *Johansen* and the soldiers in *Feres,* contained no express declaration of exclusiveness. After quoting the foregoing language of the *Feres* case, the District of Columbia Circuit Court observed (at pp. 23–24):

> By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled "to all the benefits of relief and retirement" furnished by the "policemen's and firemen's relief fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * * And in view of the general policy of Congress not to permit Federal employees to recover under the Tort Claims Act for injury at work, it certainly would seem unwarranted to permit members of the Park Police—uniquely among Federal employees—to maintain suits for damages, since the nature of their work and the benefits they receive suggest the contrary result. See *Dahn* v. *Davis,* 258 U. S. 421, 432; *Dobson* v. *United States,* 2 Cir., 27 F. 2d 807.

* * * * *

This was also the view of the Fifth Circuit in *Posey* v. *Tennessee Valley Authority* (1938), 93 F. 2d 726, 728, where it said:

> * * * This compensation is the sole remedy ordinarily available to an injured employee of

> the United States because of the general refusal to permit suits for torts. It is not a gratuity or grace, but a measured justice operating on the same general basis as state compensation laws. We entertain no doubt that Congress can limit the remedy of injured employees of its instrumentality to this compensation. We have but little doubt that it so intended. The inconvenience, uncertainty, and consequent litigation that would at once arise if the laws of each state in which the employee might work should apply must have been foreseen.

See also Schneider, *Workmen's Compensation Law* (1941), §§ 89–154, esp. § 147, p. 421; Prosser, *Torts* (1941), p. 543; 71 Corp. Jur. p. 1480.

II

Plaintiff's suggestion that this Court should go into conflict with the previous decisions under the Federal Employees' Compensation Act is not justified

1. Plaintiff urges this Court that the rule of certain cases "permits a construction that the Federal Employees' Compensation Act does not bar the action by the plaintiff" (Br. 15). Plaintiff relies chiefly upon the case of *Hitaffer* v. *Argonne Co., Inc.* (D. C. Cir., 1950) 183 F. 2d 811, and upon certain cases where the employee's injury was not service-incident.

In the *Hitaffer* case, appellant's husband had received compensation under the Longshoremen's and Harbor Workers' Compensation Act (the District of Columbia workmen's compensation statute) for injuries suffered while in the employ of appellee. The appellant sued for loss of consortium resulting

from the negligent injury to her husband. The District of Columbia court held, contrary to "the unanimity of authority elsewhere," that a wife has a cause of action for loss of consortium resulting from a negligent injury to her husband. Then, upon the theory that the wife was a third party, suing in her own right on account of the breach of an independent duty owed to her by her husband's employer, the court held that she was not precluded from suing by the Longshoremen's and Harbor Workers' Compensation Act, which provided in language practically identical with that of the Federal Employees Compensation Act, that the liability of the employer under the Act shall be exclusive.

The novelty of the *Hitaffer* case is apparent. Previously, it was the all but unanimous holding that state compensation acts and the Harborworkers' Act alike were exclusive of recovery both by nondependents and by spouses claiming loss of consortium. The only prior decision under the Harborworkers' Act had dismissed an action for wrongful death brought by a nondependent. In *Rhinehart et al.* v. *T. Smith and Son* (La. App. 1943) 14 So. 2d 287, the nondependent brother and sister of the deceased sued the employer to recover damages under the Louisiana Wrongful Death Statute, Article 2315 of the Civil Code, as amended, or in the alternative for compensation under the Louisiana Employers' Liability Act or, as a further alternative, for damages under the Jones Act (Section 33 of the Merchant Marine Act of 1920, 46 U. S. C. 688). The Court found that the deceased employee was covered by the Longshoremen's

and Harbor Workers' Compensation Act and that the remedy under that Act was exclusive. In the opinion of the Court the circumstance that the non-dependent brother and sister of deceased were not entitled to benefits under the Compensation Act did not alter its exclusiveness. At page 292 the Court stated:

> Thus, it is apparent that plaintiffs have no right of action to sue for the death of their brother under Article 2315 of the Civil Code, since this right was specifically superseded by Congress in the Longshoremen's & Harbor Workers' Compensation Act. And, since it is well settled that the death of Rhinehart resulted from an accident arising out of and within the scope of his employment within the meaning of the Longshoremen's Act and that, if he had left dependents as defined by that statute, they would have been accorded the remedies therein provided, the state court is without jurisdiction to grant relief to plaintiffs under Article 2315 of the Civil Code.

See accord, under the Louisiana Workmen's Compensation Act, *Atchison* v. *May,* 201 La. 1003, 10 So. 2d 785, 788.

Under the California Compensation Act, the case of *Treat* v. *Los Angeles Gas & El. Corp.* (1927) 82 Cal. App. 610, 256 Pac. 447, similarly sustained the dismissal of a nondependent parent's action for wrongful death. In rejecting the argument which plaintiff repeats in the case here at bar, the California court said (256 Pac. at 450):

> Appellants assert that where no dependents survive the employee the conditions of compen-

> sation do not exist, and hence that the provisions of the act have no application to the rights of such nondependents to maintain any action to which they would have recourse without regard to the Workmen's Compensation Act. This idea results from a mistaken notion of the meaning of the term "conditions of compensation." The conditions referred to are: That an injury has occurred to someone; that the person injured was an employee; that at the time of the injury both he and the employer were subject to the compensation provisions of the act; that at that time the employee was performing a service growing out of and incidental to his employment; that he was acting within the scope thereof; and that the injury was proximately caused by the employment, not due to the employee's intoxication, or intentionally self-inflicted. If these facts exist, the conditions of compensation are present, and the identity of the person who may attempt to make a claim based upon the injury to the employee, or his relation to the latter, cannot in any way affect the application of the provisions of the act, or remove the case from that class where the "conditions of compensation" exist.

Accord: *Leong* v. *Postal Tel. Cable Co.* (1944), 66 Cal. App. 2d 849, 153 P. 2d 204; *Gerini* v. *Pacific Employers' Ins. Co.* (1938), 27 Cal. App. 2d 52, 80 P. 2d 499; *McLain* v. *Llewellyn Iron Works* (1922), 56 Cal. App. 58, 204 Pac. 869.

Where one spouse sues the other spouse's employer for loss of consortium, recovery has likewise been denied. *Holder* v. *Elms Hotel Co.* (1936), 338 Mo.

857, 92 S. W. 2d 620; *Sharp* v. *Producers Produce Co.* (1932), 226 Mo. App. 189, 47 S. W. 2d 242; *Swan* v. *Woolworth Co.* (1927), 129 Misc. 500, 222 N. Y. Supp. 111; *Danek* v. *Hommer* (1951) 14 N. J. Super 607, 82 A. 2d 659; *Bevis* v. *Armco Steel Co.* (1951) 156 Ohio St. 295, 102 N. E. 2d 444; *McVey* v. *Telephone Co.* (1927), 103 W. Va. 519, 138 S. E. 97; *Guse* v. *A. O. Smith Corp.* (1952) 260 Wis. 403, 51 N. W. 2d 24.

Finally, there seems little doubt that if this case arose under the Montana Compensation Act, the nondependent father could not recover for wrongful death. In *Jarrant* v. *Helena Bldg. & Rlty. Co.* (1944) 116 Mont. 319, 156 P. 2d 168, suit was brought for the wrongful death in 1943 of a 13-year-old girl employed for $35.00 per month. The Compensation Act was held to exclude the suit. It is true that the question of nondependency was not expressly mooted, but the facts of nondependency speak for themselves. It is impossible to believe that if there was merit in the point under Montana law, counsel or the court would not have failed to raise it in view of the decided cases appearing in the Pacific Reporter.

The unresponsive character of plaintiff's reference (Br. 12) to other cases which do not involve service-incident injuries, such as *Canon* v. *United States* (N. D. Calif., 1953) 111 F. Supp. 162 and *Dishman* v. *United States* (D. Md., 1950) 93 F. Supp. 567, is of course obvious. See also *Vesel* v. *Jardine Mining Co.* (1939) 110 Mont. 82, 100 P. 2d 75, 83. Those were cases not in the performance of duty. Cases where, in the words of the *Treat* case, the "conditions of

employment'' did not exist with respect to the injury; not cases where the injury, as in the instant case, was covered by the statute but the plaintiff was not a beneficiary included by the legislature.

2. The *Hitaffer* case has been adversely criticized by both courts and note writers. See 40 Calif. L. Rev. 464; 36 Cornell L. Rev. 151–156. The two cases, *The Tampico* (S. D. N. Y., 1942), 45 F. Supp. 174, and *Rich* v. *United States* (2d Cir., 1949) 177 F. 2d 688, cited in *Hitaffer* to support the principle that the exclusive clause in question did not preclude a third person's cause of action, have been distinguished by the Second Circuit in its opinion in *American Mut. Liability Ins. Co.* v. *Matthews* (2d Cir., 1950) 182 F. 2d 322. Those cases rest, obviously, upon the principle that, where the employer is under a contract, express or implied, to indemnify a third-party, the ''exclusive remedy'' clause has no application to the contract obligation.

The criticism of the *Hitaffer* case by the Supreme Court of Ohio in the case of *Bevis* v. *Armco Steel Corp.* (1951) 156 Ohio St. 295, 102 N. E. 2d 444, is especially well founded. There the wife of an injured employee sued for loss of consortium. It was conceded that she had such an action at Ohio common law. In holding that the liability of the employer under the Ohio Workmen's Compensation Act is exclusive, the court denied any right to recover for the violation of any independent duty owing to her by her husband's employer, saying (at p. 449):

> We do not believe that the authorities relied upon in the opinion in the *Hitaffer* case,

sustain the strained conclusion reached by the court in that case on the question, which is similar to the question involved in the instant case. Apart from those authorities, the only other reasons given in the opinion in the *Hitaffer* case for that conclusion, while they might properly be considered by a legislature in determining what meaning to express, should not justify a court in determining that the legislature expressed a meaning different from that which its language clearly indicates that it did express.

3. It is to be noted that the District of Columbia court in the *Hitaffer* case was defining a common law right of action which it held was not excluded by the Longshoremen's and Harbor Workers' Compensation Act in defining the liability of employers. In the case now at bar, this court is called upon to construe two acts of Congress—the Federal Employees' Compensation Act and the Federal Tort Claims Act—and their relationship to each other as congressional expressions of waiver of sovereign immunity. The basic question is whether it was the intent of Congress in defining the exclusive liability of the United States under the Compensation Act to make an exception of any cause of action which a nondependent father might otherwise have under the wrongful death statute of a state for the death of his child.

There is no question of the authority of Congress to bar the independent right of a third person, as well as the right of an employee and rights derived through him. (See *supra,* p. 6.) The language of 5 U. S. C. 757 (b) certainly purports to bar such a

cause of action and, it is believed, in view of the exclusive character accorded to the Federal Employees' Compensation Act in the absence of section 757 (b) by the cited decisions (*supra,* pp. 6–11), it must not be construed as permitting suit by a nondependent father which would previously have been forbidden because not expressly authorized by the original Compensation Act.

CONCLUSION

For the foregoing reasons, the decision of the District Court granting the Government's motion to dismiss should be affirmed.

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